In the Supreme Court
OF THE
United States

OCTOBER TERM 1945

No.

LA SOCIETE FRANCAISE DE BIENFAISANCE MUTUELLE (a corporation),
Petitioner,

vs.

UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION OF THE COURT BELOW.

A reference to the official report of the opinion of the Circuit Court of Appeals (R. 196) is set forth in the petition, (p. 6). That reference is adopted here.

II.

STATEMENT OF JURISDICTION.

A concise statement of the grounds on which the jurisdiction of this court is invoked is given in the petition (p. 7), and, by reference thereto, is adopted here.

III.

CONCISE STATEMENT OF THE CASE.

A summary of the matter involved is given in the petition (p. 7). To avoid duplication, that statement is incorporated herein as a concise statement of the case.

IV.

SPECIFICATION OF ERRORS.

The errors intended to be urged are those specified in the petition as the questions presented and numbered 1-4 (p. 7), all of which are specifically assigned as error.

V.

SUMMARY OF ARGUMENT.

1. The Circuit Court of Appeals erred in refusing to give effect to the intention and purpose of Congress to exempt hospitals not operated for profit.

2. The Circuit Court of Appeals erred in holding that the treatment of nonmember patients is one of the "purposes" for which petitioner was organized and is operated.

3. The clause, "no part of the net earnings of which inures to the benefit of any private shareholder or individual", refers to the use, and not the source, of income;

4. The Commissioner abused his discretion in denying the refund of (a) employees' tax which had been accrued before the 1939 reversal in ruling; (b) interest on all taxes from various dates when same first allegedly became due, and (c) penalities imposed for non-payment.

ARGUMENT.

I.

THE CIRCUIT COURT OF APPEALS ERRED IN REFUSING TO GIVE EFFECT TO THE INTENTION AND PURPOSE OF CONGRESS TO EXEMPT "HOSPITALS NOT OPERATED FOR PROFIT".

The history of the Social Security Act conclusively establishes that Congress considered *"hospitals not operated for profit"* to be "charitable" and intended to exempt them. This explicity appears from the action of the conferees of both Houses.

Such intention was expressly declared when the conferees were considering the amendments to the bill. They then said that it was unnecessary to exclude such hospitals *in terms* since, by the settled construction

of identical language in the income tax law, they were *already* within the definition of "charitable" corporations.

The Record (Cong. Rec. Vol. 79, Part 10, pp. 11,321 and 11,323, amendments Nos. 15 and 81) shows that, in the sections in question, the Senate had proposed the addition of *"or hospital"*. In conference, the Senate receded for the reason that these words were *surplusage*. Thus, the statement of the Managers for the House appended to the Conference Report[7] states:

> "The Senate amendment adds to the list of purposes *'or hospital'* as a clarifying amendment. The Senate recedes, the conferees omitting this language as *surplusage,* based on the fact that *the internal revenue bureau had uniformly construed language in the income tax laws identical with that found in the house bill, as exempting hospitals not operated for profit,* and also on the fear that the insertion of the words added by the Senate amendment might interfere with the long-continued construction of the income tax law." (Emphasis added)

From this it is apparent that:

1. The Act must be read as if its language were, "religious, charitable, scientific, literary, or educational, *or hospital,* purposes". This is what Congress intended.

2. Congress considered that "hospitals not operated for profit" were "charitable" institutions.

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[7]H.R. No. 1540, 74th Congress, 1st Session.

3. The report *itself construes* the clause, "no part of the net earnings of which inures to the benefit of any private shareholder or individual", as inapplicable to nonprofit hospitals. Since Congress intended to exempt "hospitals not operated for profit", it evidently considered that they satisfied the requirements of this clause.

4. *All* nonprofit hospitals were treated alike. *All* were exempted, and not merely *some* of them. The exclusion was not of "free", or "charitable", or "nonmember", hospitals. The only test is, "operated for *profit*". What Congress did *not* wish to exempt were the 2,295 "proprietary" hospitals.

The Commissioner's letter to petitioner of February 24, 1939, states that *"it appears you are not operated for profit"* (R. 45-46). The government cannot point out how many of the 2,967 "nonprofit" hospitals shall be denied exemption, nor by virtue of what principle of differentiation.

One-fourth of all employees (9,389,000 out of 37,743,000), were intentionally excluded. Among those excluded, were *"institutional* workers".[8] The House and Senate reports each states:[9]

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[8]Webster (new Int. Dict.) defines an "institution" as, "An established or organized society or corporation, an establishment, especially one of public character or one affecting a community." Petitioner is an "institution".

[9]H. Rep. No. 615, p. 15, Sen. Rep. No. 628, p. 27.

"Total number of gainful workers	48,830,000
Total number of owners, operators, self-employed (including the professions)	12,087,000
Total of workers *excluded* because of occupation (farm labor, domestics, teachers, and governmental and *institutional workers*)	9,389,000
Total number of workers in eligible occupations	27,354,000"

In each report (H. Rept. pp. 22, 33, Sen. Rep. pp. 33, 45) there twice appears an explanation of "charitable". All four are virtually identical. Thus (H. Rep. p. 33):

> "Services performed in the employ of religious, charitable, scientific, literary, or educational institution, no part of the net earnings of which inures to the benefit of any private shareholder or individual, are also exempt from the tax imposed by this title. For the purpose of determining whether such an organization is exempt, the *use to which the income is applied is the ultimate test of the exemption rather than the source from which the income is derived.* For instance, if a church owns an apartment building from which it derives income which is devoted to religious, charitable, educational, or scientific purposes, it will not be denied the exemption. The organizations which will be exempt from such taxes are churches, schools, colleges, and other educational institutions not operated for private profit, the Y. M. C. A., the Y. W. C. A., the Y. M. H. A., the Salvation Army, and other organizations which are exempt from income tax

under section 101 (6) of the Revenue Act of 1932" (Italics ours).

The opinion rendered by Attorney General Biddle to the President (40 Op. A. G., No. 72) in part states:

"Investigation discloses, however, that the Bureau of Internal Revenue's interpretation of the statute is in accord with its interpretation of similiar language contained in the income tax law, which interpretation was made some years prior to the enactment of the Social Security Act, and apparently has been consistently followed.

"In addition, the legislative history of the Social Security Act shows that the conferees eliminated a specific amendment exempting hospitals as surplusage on the ground that the language in the income tax law, identical with that contained in the House bill, has been uniformly construed by the Bureau of Internal Revenue as exempting hospitals not operated for profit, 'and also on the fear that the insertion of the words added by the Senate amendment might interfere with the continuation of the long-continued construction of the income-tax law.' H. Rept. 1540, 74th Cong., 1st sess., p. 7. Thus, the history clearly shows that the language of the exemption in the statute was adopted by the Congress with knowledge that it had been construed to exclude nonprofit hospitals. This, I think, demonstrates congressional approval of that construction and evidences the intention that the exemption in the Social Security Act should receive the same construction."

Although the intention of Congress is not in doubt, so that any extended discussion is unnecessary, it may not be improper briefly to set forth the principles by which the charitable character of an institution is determined. The supporting authorities appear in the appendix.

1. "Charity" is not limited to "almsgiving" nor to gifts to the poor. Its legal meaning is far more comprehensive. Neither is it limited to any narrow or stated formula, (Appen. p. 38).

2. "Charity" represents "both a personal and a social endeavor to ameliorate the conditions which exist in society", (Enc. Brit., 14th (1936) Ed., Vol. 5, p. 248). "It has no necessary relation to relief or alms. It may mean a consideration shown for the welfare of others either individually or generally", (Id., p. 249). Any nonprofit institution ministering to a fundamental human need (old age, education, sickness or religious worship) is, per se, a "charity".

Ould v. Washington Hospital, 95 U. S. 303, 311, declares that a charitable use refers to "almost anything that tends to promote the well-doing and well-being of social man". A nonprofit hospital, though not confined to the poor, is a public charity, (Buchanan v. Kennard, 234 Mo. 117, 139, 136 S. W. 415, Ann. Cas. 1914D 50). "Charitable" purposes include the "promotion of health" and "other purposes the accomplishment of which is beneficial to the community", (*Restatement Trusts,* Sec. 368).

Petitioner, with its present equipment and facilities, is the result of the acts of its founders in estab-

lishing it, of its members in continuing to maintain it, and of the gifts and legacies it has received, so that there now exists an institution whose membership is unlimited, which tends to promote the "well-doing and well-being" of the community as a whole. The test of its charitable character, and the basis for the exemption, is whether it acts for profit and the benefit derived by the public at large.

3. By the overwhelming weight of authority throughout the United States, a nonprofit hospital is, per se, a charitable institution. (Appen. p. 39).

4. The test of a charity is to be found in the purpose for which the institution is founded and exists. The motive of, or benefit to, donor or settlor is immaterial, (Appen. p. 42).

Regardless of the expectations or motives of petitioner's members as they may be from time to time, there now exists, largely from donations and bequests, an institution which, without profit, not only affords complete protection to the health of nearly ten thousand persons, but also stands ready similarly to care for all others complying with its simple and nonexclusive requirements for admission.

5. That a non-profit institution (school, hospital or home) makes a charge against members, or that inmates pay a consideration on their admission, or a charge is made to defray costs of operation, does not affect its charitable character, (Appen. p. 42).

6. The restriction of benefits to its own members does not affect a nonprofit institution's charitable

character, (Appen. p. 43). Here, however, it would be misleading to argue that petitioner restricts its benefits to its *own* members. Since membership is unlimited, it evidently seeks to spread those benefits as widely as possible.

In his opinion (R. 36-37) the trial judge stated:

> "Non-profit hospitals have frequently been held, for purposes of taxation, to be charitable institutions, although they receive paying patients, so long as a portion of their work is charitable. *Commissioner of Internal Revenue v. Battlecreek Inc.,* 126 F. (2d) 405; *In re Mendelsohn,* 31 N.Y.S. (2d) 435; *In re Rust's Estate,* 12 Pac. (2d) 396; *New England Sanitarium v. Inhabitants of Stoneham,* 91 N.E. 385; *State v. H. Longstreet Taylor Foundation,* 269 N.W. 469; *Virginia Mason Hospital Ass'n v. Larson,* 114 Pac. (2d) 976. In *Butterworth v. Keeler,* (N.Y) 114 N.E. 803, Mr. Justice Cardozo said that non-profit 'universities and hospitals are unquestionably public charities'; and in *Slee v. Commissioner,* 42 F. (2d) 184, Judge Learned Hand observed that the object to maintain health without profit 'has been a recognized kind of charity from time immemorial.'
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> "An organization such as plaintiff's is of great public benefit. It enables a person of limited means, through the payment of small monthly sums, to receive medical care without resorting to public charity. The need for such protection has long been recognized, and there has been agitation for compulsory insurance of this type. A non-profit hospital which has no stock and pays no dividends renders a public service, and I think

> Congress has clearly shown its intent to exclude such hospitals from the provisions of the Act."

We submit, therefore, that the intention of Congress to exempt "hospitals not operated for profit" appears beyond question and that the Circuit Court of Appeals erred in refusing to give effect to such intention.

II.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT THE TREATMENT OF NON-MEMBER PATIENTS IS ONE OF THE "PURPOSES" FOR WHICH PETITIONER WAS ORGANIZED AND IS OPERATED.

The Circuit Court has (1) confused petitioner's "purposes" with the *means* by which they are accomplished, and (2) has read "charitable" as if it were somehow defined or explained by the clause, "no part of the net earnings of which inure to the benefit of any private shareholder or individual".

This latter clause also appears in the income tax law in the provisions exempting cemetery corporations, business leagues, chambers of commerce, real estate boards or boards of trade, and recreation clubs, (I. R. C. Sec. 101(5)(7)(9). It no more enters into the definition of "charitable" than into that of "board of trade", or of "literary", or of "scientific". For example, in the *Better Business Bureau* case, the government *stipulated* that "the net earnings did not inure to the benefit of any private shareholder or

individual". Yet this did not make Bureau's "purposes" any more "educational".

Thus, a school may be operated for profit, and still be exclusively "educational", (*Kemper Military Academy v. Crutchley,* 274 Fed. 275). Or a society of book lovers is "literary", or one of scientists is "scientific", although their facilities are not free to the general public, (*United States v. Proprietors of Social Law Library,* 1st Circ., 102 Fed. (2d) 481). A church congregation is "religious", though its benefits are reserved primarily to its paying members, (*Estate of Lubin,* 186 Cal. 326, 199 Pac. 15).

"Exclusively" modifies "organized and operated". It refers to the "purposes" for which the institution is "organized and operated". *Non*-charitable "purposes" are excluded, but activities in aid of charitable "purposes" are not precluded.

Rendering medical treatment without profit to an indefinite portion of the public (petitioner's unlimited membership) and its availability to and use by the public in general is a charitable "purpose".

If, then, such "purpose" is "charitable", receipt of rents or other income, payments by non-member patients, or subletting of surplus facilities, do not change this. "Such activities are *mediate* to the primary purpose," (Learned Hand, J., in *Slee v. Commissioner,* 2d Circ., 42 Fed. (2d) 184). Income so used does not inure to "private" advantage.

For nonprofit hospitals to reduce their overhead by also caring for nonmembers helps to widen their bene-

fits. The better petitioner accomplishes this, the better it deserves and justifies the exemption. That such nonprofit institution uses receipts from nonmember patients to give more people better service at lower rates, does not change its character as a hospital "not operated for profit".

The act favors *non*-pecuniary benefits, that is, the treatment of the sick without profit. Congress exempted nonprofit hospitals because of their benefit to the entire community. The imposition of the tax upon petitioner is subversive of this public policy. To deny exemption where income, from whatever source, is applied to promote the health of a large part of the community, nullifies the intention of Congress. The added benefits to appellee's members from augmented earnings, from whatever source derived, is the purpose upon which the exemption of nonprofit hospitals is founded. Nor does petitioner benefit at the "expense" of outsiders. The latter pay only the current prevailing rates for like hospitals in the community (R. 144).

Since, therefore, petitioner's purpose—to treat the sick without profit—is a charitable one, and since any net earnings are devoted exclusively to that "purpose", it is operated "exclusively" for a charitable "purpose".

The opinion of the Circuit Court entirely misconceives, and hence directly conflicts with, *Better Business Bureau v. United States,* 326 U.S. ..... 90 L. Ed. 76, 66 St. Ct. 112, which is the converse of the pres-

ent case. The opinion in that case states that, to be exempt, "the organization must be devoted to educational *purposes* exclusively"; that the presence of a single substantial "non-educational *purpose*" will destroy the exemption, regardless of the number or importance of "truly educational *purposes*"; that "an important if not the primary *pursuit*" of the Bureau was to promote a "profitable *business* community"; that its organization was permeated by a "*commercial* hue", and that its activities were largely animated by this "*commercial purpose*", which was directed fundamentally to *non*-educational "*ends*", (Emphasis added)

Even assuming, as the opinion of the Circuit Court of Appeals states, that treatment of nonmember patients is a "business venture" and that thereby petitioner had entered into an independent "field", income from such source is nevertheless but a *means* by which petitioner accomplishes its "purpose", that is, the treatment of the sick without *profit*.

Furthermore, the opinion in the *Better Business Bureau* case emphasizes the legislative history of the Act as an important aid to its construction.

We submit, therefore, that the Circuit Court of Appeals erred in holding the treatment of non-member patients to be one of petitioner's "purposes".

III.

IT IS ESTABLISHED THAT THE CLAUSE, "NO PART OF THE NET EARNINGS OF WHICH INURES TO THE BENEFIT OF ANY PRIVATE SHAREHOLDER OR INDIVIDUAL", REFERS TO THE USE, AND NOT THE SOURCE, OF SUCH EARNINGS.

As later will appear, not only is the government's contention to the contrary an afterthought, but we have shown (supra, p. 17) that Congress has construed this clause as not applying to "hospitals not operated for profit."

Income Tax Regulations 111, (1943), Sec. 29.101-1, p. 314, state that " 'private shareholder or individual', in Section 101, refer to individuals having a *personal and private interest* in the activities of the corporation". This could scarcely be said of *each* member of a group of 9,800. A like definition of "individual" follows from the rules of *ejusdem generis and noscitur a sociis.*

Operation for profit is contemplated and permitted. What is forbidden is that "net earnings" should inure to any "private" shareholder or individual, that is, to the *private* advantage of one or more of the group. A member of petitioner, however, has "merely the right to the use thereof as long as he continues to be a member", (10 Corp. Jur. Secun. 297).

As well might it be claimed that savings resulting from petitioner's receipts from non-member patients constitute "income" to *each* member. "Net earnings" could not "inure" to the benefit of a "private share-

holder or individual" until "severed" from the general fund for his separate use and benefit, so as thereby to afford him a benefit private and peculiar to him, (*Eisner v. Macomber,* 252 U. S. 189, 40 S. Ct. 189). The distinction is between assets retained by the group in its organized capacity and individuals "privately" benefited.

Moreover, in the eight years before February 29, 1944, petitioner had *no* "net earnings", but sustained a loss of $35,283.96 (R. 156). The statute refers to the corporation's earnings as a whole. It does not treat it as departmentalized or as divided into separate income-producing units.

As we have shown, (supra p. 18), the House and Senate reports each state:

> "for the purpose of determining whether such an organization is exempt, the *use* to which the net income is applied is the ultimate test of the exemption rather than the *source* from which the income is derived."

The opinion of the Circuit Court, however, ignores this. It also ignores, and is directly contrary to, *Trinidad v. Sagrada Orden de Predicatores,* 263 U. S. 581, 68 L. Ed. 458, 44 S. Ct. 204, where a corporation sole, representing a religious order, received income by way of rents, interest, dividends, and profits on small quantities of supplies sold to its agencies. The language of the statute was identical to that here involved. Held, exempt.

> "Whether the contention is well taken turns primarily on the meaning of the excepting clause,

before quoted from the taxing act. Two matters apparent on the face of the clause go far towards settling its meaning. First, it recognizes that a corporation may be organized and operated exclusively for religious, charitable, scientific or educational purposes, and *yet have a net income. Next, it says nothing about the source of the income, but makes the destination the ultimate test of exemption.*

"Evidently the exemption is made in recognition of *the benefit which the public derives* from corporate activities of the class named, and is intended to aid them when not conducted for private gain. *Such activities cannot be carried on without money;* and it is common knowledge that they are largely carried on with income received from properties dedicated to their pursuit.".

At page 582:

"In using the properties to produce the income, it therefore *is adhering to and advancing those purposes,* and not stepping aside from them or engaging in a business pursuit."

"*Financial gain is not the end* to which they are directed." (All emphasis added.)

Id.

Similarly, the decision of the Circuit Court of Appeals directly conflicts with decisions of the First, Second and Fifth Circuits and of the Court of Appeals for the District of Columbia, all of which hold that exemption is not lost if the profits are retained by the organization or used to further the purposes

which are made the basis for the exemption. Those cases are:

Commissioner v. Kensico Cemetery, 2d Circ., 96 Fed. (2d) 594, 596.

Membership corporation deriving profits from sale of burial plots and incidental services, which were devoted to the payment of its debts and to cemetery's maintenance and improvements. Held, exempt. "The cemetery's revenues were devoted to the purpose for which the statute desires them to be exempt", that is, "to a public purpose which the tax law aims to protect".

United States v. Proprietors of Social Law Library, 1st Circ., 102 Fed. (2d) 481, 484.

Facilities of Library were open to all citizens of Boston willing to aid in its upkeep by becoming a "proprietor" or "subscriber", and were also free of charge to certain State and Federal officials. Held, exempt, though net earnings enabled it to do better work, whereby it was made more serviceable to its members, and notwithstanding that this "resulted in distributing its benefits among private shareholders or individuals".

Roche's Beach, Inc. v. Commissioner, 2d Circ., 96 Fed. 776.

Income earned by the incorporated business subsidiary of a charitable testamentary foundation, held, exempt.

Santee Club v. White, 5th Circ., 87 Fed. (2d) 5, 7.

Recreation club not taxable on profits realized on sale of small unusable portion of its property, profits inuring to members through use of club's facilities not being "benefit" within meaning of income tax law.

> "No part of the profit on the sale of real estate in question inured to the benefit of the Club's shareholders except through their use of the Club facilities, which is clearly not the benefit referred to in the exempting clause of the statute."

Koon Kreek Klub, v. Thomas, 5th Circ., 108 Fed. (2d) 616, 618;

Club leased grazing privileges on its game preserve, also granted oil lease on its entire property for present cash considerations and annual renewal rental. Proceeds used to pay mortgage on property. Held, exempt.

> "The exemption applies to profits so long as they are retained by the organization or used to *further the purposes which are made the basis of the exemption,* and are *not otherwise* used for the benefit of any private shareholder." (emphasis ours)

There was a like ruling, under similar circumstances, in *Scofield v. Corpus Christi Golf & Country Club,* 5th Circ., 127 Fed. (2d) 452.

District of Columbia v. Mt. Vernon Seminary,
100 Fed. (2d) 116, (Ct. App. D. Col.)

Act exempted "property used for educational purposes that is not used for private gain". Plaintiff's property was all used for educational purposes. No excess of receipts over expenditures had gone to incorporators or to any contributor to endowment.

> "The term 'private gain' as used in the statute, has reference only to gain realized by any individual or stockholder who has a *pecuniary interest* in the corporation and not, as appellant contends, to profits realized by the institution but turned back into the treasury or expended for permanent improvements. See Commonwealth v. Trustees Hamilton College, 125 Ky. 329, 101 S. W. 405. It is the evident intention of the statute to exempt all institutions, educational in nature, which are not *commercial* in their purpose.
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> "Congress has recognized the fundamental difference between income earned by an educational institution which is diverted into *private* use, and similar income which is dedicated to the *continued improvement* of the institution. The latter is a highly desirable use from the public point of view and equally worthy of tax exemption as the property out of which the income was produced." (emphasis ours)

We submit, therefore, (a) that receipts from non-member patients do not constitute "net earnings" inuring to the private benefit of any member, and (b) that Congress intended that the clause, "no part of the net earnings", should not apply to "hospitals not operated for profit".

Indeed, the government's contention belatedly comes as an afterthought or makeweight. In the court below, its counsel (brief p. 3) after reviewing petitioner's organization and activities, stated that "therefore, it would follow that plaintiff has qualified itself under the last portion of the exemption quoted above, i. e.

> 'the net earnings, no part of which inures to the benefit of any private shareholder or individual.' "

Similarly, in *Better Business Bureau v. United States,* 60 S. Ct. 112, the government *stipulated* to this effect.

IV.

THE COMMISSIONER ABUSED HIS DISCRETION IN DENYING THE REFUND OF (a) EMPLOYEES' TAXES ACCRUED BEFORE THE 1939 REVERSAL IN RULING; (b) INTEREST ON ALL TAXES FROM THE VARIOUS DATES WHEN SAME ALLEGEDLY FIRST BECAME DUE, AND (c) PENALTIES IMPOSED FOR NON-PAYMENT.

In addition to its own tax under Titles VIII and IX, ($21,719.29), petitioner was required to pay $13,550.56, represented by:

Employees' tax, (Title VIII), paid by appellee from its own funds and not repaid to it	$6,195.77
Penalties (under Title IX)	976.21
Penalties (under Title VIII)	4,019.84
Interest (under Title IX)	404.13
Interest (under Title VIII)	1,954.61

Deducting petitioner's own taxes for the three years after 1939, leaves $12,659.82. Employees' taxes prior to April 1, 1939, interest and penalties have, therefore, *added more than one hundred per cent* to its own obligations to the end of 1939. But for the conflict in rulings, no part of this would have had to be paid. The claims for refund set forth this reversal in ruling (R. 20).

Under such circumstances, courts make every effort to redress flagrant injustice, (*Bull v. United States,* 295 U. S. 247, 79 L. Ed. 421, 55 S. Ct. 695).

The question is not whether, as the Circuit Court held, the Commissioner was "estopped from changing his ruling that the Society was exempt", but whether he abused his discretion. That, for example, petitioner, though wholly blameless, should be required to pay penalties of $4,996.05 deeply offends the moral sense.

While in *La Societe Francaise de Bienfaisance Mutuelle v. California Employment Commission,* 56 Cal. App. (2d) 534, 552, 133 P. (2d) 42, the District Court of Appeal said that

> "the state may not belatedly hold the employer to payment where he has failed to pay, or to make the necessary deductions from his employees' wages, in reliance on an express ruling that he is not liable for the tax. As between the state and the employer, the state may not in good conscience thus place on the employer a burden which the act itself did not intend that he should bear. We are further of the view that the employer cannot be held to pay interest on contributions which

were not paid when due solely in reliance on the official ruling of non-liability."[10]

we need not here contend that the government is estopped. Probably no court would say that it can *never* be estopped.

However, petitioner is entitled to redress because of abuse by the Commissioner of the discretion which the law reposes in him. We are not dealing with the taxpayer's *own* obligation. Liability for the employees' tax is to be borne by *them*. The employer merely transmits it to the fund. After the 1937 ruling, petitioner had no alternative but to pay wages without deduction. Nonpayment would have been a misdemeanor, (Calif. Labor Code, Sec. 216).

The case is stronger in this respect than *Markham v. Cabell*, 326 U. S. ....., 90 L. Ed. 168, 66 S. Ct. 193, 195, where it was said:

> "The policy as well as the letter of the law is a guide to decision. Resort to the policy of a law may be had to ameliorate its seeming harshness *or to qualify its apparent absolutes.*" (Emphasis added).

Congress never intended that, where a ruling is reversed, the government's right to tax, interest and penalty should nevertheless under all circumstances remain absolute. The Commissioner is authorized,

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[10]This case was followed in *Garrison v. State*, 64 Cal. App. (2d) 820, 149 P. (2d) 711. *Waterbury Savings Bank v. Danaher*, 128 Conn. 78, 20 Atl. (2d) 455, goes further and allows recovery by the employer of the employer's tax which had accrued before the reversal in ruling. The case contains an extended discussion.

with the approval of the Secretary, to prescribe the extent, if any, to which any ruling relating to the internal revenue laws would be applied without retroactive effect, (26 U. S. Code, Sec. 3791(b)). He may refund penalties collected without authority, and all taxes "in any manner wrongfully collected", (Id. Sec. 3770(a)(1)). The penalty of twenty-five per cent for failure to file a return cannot be imposed where such failure "was due to a *reasonable cause and not to wilful neglect*", (Id. Sec. 3612(d)). Regulations, to be valid, must be reasonable, (*Manhattan General Equipment Co. v. Commissioner,* 297 U. S. 129, 134, 80 L. Ed. 528, 56 S. Ct. 397).

Congress did not intend to impose a penalty upon a taxpayer who, though ready to pay, was told that no tax was due and that none could be accepted. This is equally true of interest. A tender could not be made where the Commissioner disclaimed the right to receive any tax.

In the absence of contract, interest is awarded as *damages* after default, that is, on the theory of *wrongful* detention, (*Redfield v. Ystalyfera Iron Co.,* 110 U. S. 174, 3 S. Ct. 570, 28 L. Ed. 109). Moreover, as said in *Board of Commissioners v. United States,* 308 U. S. 343, 352, 60 S. Ct. 285, 84 L. Ed. 313:

> "Interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness. It is denied when its exaction would be inequitable."

We submit, therefore, that the Commissioner abused his discretion in denying relief to petitioner in respect of employees' taxes paid by it from its own funds, interest and penalty.

We submit, therefore, that the Circuit Court of Appeals erred (a) in refusing to give effect to the intention and purpose to exempt hospitals not operated for profit; (b) in holding that the treatment of non-member patients is one of petitioner's "purposes", and that the fact of payments by such non-member patients, rather than the *use* thereof, determines its charitable character; (c) in holding that the clause, "no part of the net earnings of which inures to the benefit of any private shareholder or individual", has reference to the *source,* instead of to the *use,* of petitioner's earnings, and (d) in denying petitioner redress for the Commissioner's abuse of discretion in respect of employees' taxes paid by it, interest and penalties.

Petitioner respectfully urges that a writ of certiorari be issued.

Respectfully submitted,

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P. A. BERGEROT,

A. P. DESSOUSLAVY,

Of Counsel.

Authorities holding that "charity" is not limited to almsgiving or gifts to the poor, but that its legal meaning is more comprehensive than its popular significance.

14 *Corp. Juris. Secun.* 411;

Bogert on Trusts, Vol. 2, pp. 1163-4;

Pennsylvania Co. v. Helvering, 66 Fed. (2d) 284, (Ct. App. Dist. Col.);

Stuart v. City of Easton, 3rd Circ., 74 Fed. 854;

Ettlinger v. Trustees of Randolph-Macon College, 4th Circ., 31 Fed. (2d) 869;

Long v. Rosedale Cemetery, 84 Fed. 134, 136;

Harrison v. Barker Annuity Fund, 7th Circ., 98 Fed. (2d) 286;

Darcy v. O'Brien, 65 Fed. (2d) 599, (Ct. App. Dist. Col.);

Old Colony Trust Co. v. Welch, 25 Fed. Supp. 45, 58 (D.C. Mass.);

Powers v. Massachusetts Homeopathic Hospital, 101 Fed. 896 (Circ. Ct. Mass.);

Gossett v. Swinney, 8th Circ., 53 Fed. (2d) 772, 776;

Todd v. Citizens' Gas Co., 7th Circ., 46 Fed. (2d) 855;

Union & New Haven Trust Co. v. Eaton, 20 Fed. (2d) 419, 421, (D.C. Conn.);

International Reform Ass'n. v. District Unemployment Compensation Board, 131 Fed. (2d) 337, (Ct. App. Dist. Col.);

Santa Fe Lodge No. 460 B.P.O.E. v. Employment Security Commission, 159 Pac. (2d) 312, (New Mex., May 1945).

Authorities holding nonprofit hospitals to be per se charitable corporations.

(a) *Cases involving exemption from taxation:*

In re Mendelsohn, 262 App. Div. 605, 51 N.Y.S. (2d) 435, 440 (social security tax);

Commissioner of Internal Revenue v. Battlecreek, Inc., 126 Fed. (2d) 405, (income tax);

In re Rust's Estate, 168 Wash. 344, 12 Pac. (2d) 396, 398 (1932);

New England Sanitarium v. Inhabitants of Stoneham, 205 Mass. 335, 91 N.E. 385, 387, (1910);

People v. Sexton, 267 App. Div. 736, 48 N.Y. Supp. (2d) 201;

Scripps Memorial Hospital v. California Employment Commission, 24 Cal. (2d) 669, 151 Pac. (2d) 109, (social security tax);

Brattleboro Retreat v. Town of Brattleboro, 106 Vt. 228, 173 A. 209, 212, (1934);

Lutheran Hospital Ass'n v. Baker, 40 S.D. 226, 167 N.W. 148 (1918);

State v. H. Longstreet Taylor Foundation, 198 Minn. 263, 269 N.W. 469 (1936);

German Hospital v. Board of Review, 233 Ill. 246, 84 N.E. 215;

County of Henepin v. Brotherhood of Gethsemane, 27 Minn. 460, 38 A. R. 298;

Bedford v. Colorado Fuel & Iron Corp., 102 Colo. 538, 81 Pac. (2d) 752, 759;

Rush Hospital Benev. Ass'n v. Board of Sup'rs., 187 Miss. 204, 192 So. 829 (1940);

Piedmont Memorial Hospital v. Guilford County, 218 N.C. 673, 12 S.E. 265;

Virginia Mason Hospital v. Larson, 9 Wash. (2d) 284, 114 Pac. (2d) 976, (social security tax).

(b) *Other authorities:*

Buchanan v. Kennard, 234 Mo. 117, 139, 136 S.W. 415, Ann. Cas. 1912D 50;

Mulliner v. Evangelischer Diakonniessenverein, 144 Minn. 392, 175 N.W. 699;

Magnuson v. Swedish Hospital, 99 Wash. 399, 169 Pac. 828, 830, (1918);

Hearns v. Waterbury Hospital, 66 Conn. 98, (1895), 33 Atl. 595;

Barnes v. Providence Sanitarium, 229 S.W. 588, (Tex. Civ. App.);

Maretick v. South Chicago Community Hospital, 297 Ill. App. 488, 17 N.E. (2d) 1012, 1013;

Union Pacific Railway Co. v. Artist, 60 Fed. 365, (C.C.A. 8th, 1894), (Railroad hospital);

Texas Central R. Co. v. Zumwalt, 103 Texas 603, 132 S.W. 113, 30 L.R.A. (N.S.) 1206, (Railroad hospital);

Carr v. Northern Pacific Beneficial Ass'n., 128 Wash. 484, 221 Pac. 981;

Richardson v. Carbon Hill Coal Co., 10 Wash. 656, 39 Pac. 95;

Wells v. Ferry Baker Lumber Co., 57 Wash. 658, 107 Pac. 869, 29 L.R.A. (N.S.) 426;

Barden v. Atlantic Coastline Ry. Co., 152 N.C. 318, 67 S.E. 971;

Thomas v. Postal Telegraph-Cable Co., 48 S.W. (2d) 422, (Ct. Civ. App. Tex. 1930);

Galveston H. & S. Ry. Co. v. Hanway, 57 S.W. 695, (Ct. Civ. App. Tex. 1900);

Southern etc. Sanitarium v. Wilson, 45 Ariz. 522, 46 Pac. (2d) 118, 125, 77 Pac. (2d) 458;

Miller v. Mohr, 198 Wash. 619, 89 Pac. (2d) 807;

McDonald v. Mass. Gen'l Hospital, 120 Mass. 432, 21 Am. Rep. 529;

Reynolds Memorial Hospital v. Marshall County Court, 78 West Va. 685, 90 S.E. 238 (1916);

Enell v. Baptist Hospital, 45 S. W. (2d) 395 (Tex. Civ. App. 1931);

City of Palestine v. Missouri-Pacific Lines H. Ass'n., 99 S. W. (2d) 311, (Ct. Civ. App. Tex. 1936);

Miami Battlecreek v. Lummus, 140 Fla. 718, 192 S. 211 (1939);

Beverly Hospital v. Early, 292 Mass. 201, 197 N. E. 641, 100 A. L. R. 1332;

City of Dallas v. Smith, 130 Tex. 225, 107 S. W. (2d) 872;

Illinois Central R. Co. v. Moodie, 23 Fed. (2d) 902 (C. C. A. 5th);

Scott on Trusts (1939), p. 1996;

Zollman on Charities, p. 188;

Trusts, Restatements, Sections 372, 376;

Bogert on Trusts (1935), Vol. 2, p. 1163.

Authorities holding that the test of a charity is to be found in the purpose for which the institution is founded and exists and that the motives of, or benefit to, a donor or settlor are immaterial.

Bogert on Trusts, Vol. 2, pp. 1126-7;

Fire Insurance Patrol v. Boyd, 120 Pa. St. 624, 6 A. S. R. 745, 750, 1 L. R. A. 417;

Fordyce & McKee v. Women's Christian Nat. Library Ass'n., 79 Ark. 550, 96 S. W. 155;

Harrison v. Barker Annuity Fund, 98 Fed. (2d) 286;

Union Pacific Railway Co. v. Artist, 60 Fed. 365 (C. C. A. 8th, 1894);

Parsons v. Childs, 345 Mo. 689, 136 S. W. (2d) 327, 332; Cert. den. 310 U. S. 640;

Old Colony Trust Co. v. O. M. Fisher Home, Inc., 301 Mass. 1, 16 N. E. (2d) 10, (1938);

Westport Bank & Trust Co. v. Fable, 126 Conn. 665, 13 Atl. (2d) 862, 866 (1940).

Authorities holding that the fact a non-profit institution makes a charge against members, or that its inmates pay a consideration on their admission, or that a non-profit school or hospital makes some charge to help to defray the cost of its operation, does not affect its charitable character.

Bogert on Trusts, Vol. 2, pp. 1114-15;

Estate of Lowe, 326 Pa. 375, 192 Atl. 405, 111 A. L. R. 518 (1937);

People v. Morton, 373 Ill. 72; 26 N. E. (2d) 504 (1940);

Little v. City of Newburyport, 210 Mass. 414, 96 N. E. 1032;

In re McDowell, 217 N. Y. 454, 112 N. E. 177;

In re Y. M. C. A. Retirement Fund Inc., 18 B. T. A. 139;

Episcopal Academy v. Phila., 150 Pa. 565, 573;

Summers v. Chicago Title & Trust Co., 335 Ill. 564, 167 N. E. 777;

Andrews v. Young Men's Christian Association, 226 Iowa 374, 284 N. W. 186 (Iowa 1939).

Authorities holding that the restriction of benefits to its own members does not affect a non-profit institution's charitable character.

Bogert on Trusts, Vol. 2, pp. 1124-25;

Hibernian Benevolent Society v. Kelly, 28 Ore. 173, 42 Pac. 3, 30 L. R. A. 167, 52 A. S. R. 769;

Morrow v. Smith, 145 Ia. 514, 124 N. W. 319;

United States v. Proprietors of Social Law Library, 102 Fed. (2d) 481, 484 (C. C. A. 1st, 1939);

Pease v. Pattinson, L. R. 32 Ch. Div. 154, 55 L. J. Ch. N. S. 617, 54 L. T. N. S. 209;

Spiller v. Maude, 11 L. T. (N.S.) 329;

In re Buck, (1896), 2 Ch. 727;

Carter v. Whitcomb, 74 N. H. 482, 487, 69 Atl. 779;

Widows' and Orphans' Home of O. F. v. Commonwealth, 126 Ky. 386, 103 S. W. 354;

Most Worshipful G. L. of A. F. & A. M. v. Board of Review, 281 Ill. 480, 117 N. E. 1016, 1017;

City of Indianapolis v. The Grand Master, etc., 25 Ind. 518, 522;

Estate of Lubin, 186 Cal. 326;

Estate of Henderson, 17 Cal. (2d) 853 (1941).